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No. 91-\_\_

Supreme Court U.S.

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In The  
**Supreme Court of the United States**  
October Term, 1991

PACIFIC BELL, PACIFIC TELESIS GROUP,  
PACIFIC TELEPHONE & TELEGRAPH COMPANY,  
PACIFIC TELESIS GROUP PENSION PLAN FOR  
SALARIED EMPLOYEES,

*Petitioners,*

v.

LANA PALLAS (aka Lana Hubbs),  
and persons similarly situated,

*Respondents.*

Petition For Writ Of Certiorari To The  
United States Court Of Appeals  
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The decision of the court of appeals presents the following questions, on which the circuits are in conflict:

1. Does Title VII of the Civil Rights Act of 1964, which expressly provides that "it shall not be an unlawful employment practice for an employer to apply different \* \* \* terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system," nevertheless prohibit an employer from using seniority unless the employer retroactively applies new legal requirements to long-established seniority dates to eliminate the present effects on seniority of past employment decisions that were lawful when they occurred, but have been prohibited by subsequent legislation?

2. Does ERISA impose an undefined standard of "discrimination" or "fairness," independent of the requirements of Title VII, that governs an employer's decision of what benefits to provide and to whom under an ERISA benefit plan?

## **PARTIES**

All parties to the proceeding appear in the caption of the case except the following parties that were defendants and appellees in the court below and that, pursuant to Rule 12.4 of this Court's rules, are deemed to be respondents in this Court:

American Telephone & Telegraph Company  
Bell System Management Pension Plan  
Bell System Pension Plan

Petitioners submit the following list pursuant to Rule 29.1 of this Court's rules:

Petitioner Pacific Telesis Group has no parent corporations and no subsidiaries except wholly owned subsidiaries.

Pacific Telesis Group is the parent corporation of petitioner Pacific Bell, which it wholly owns.

Petitioner Pacific Bell has no subsidiaries except wholly owned subsidiaries, other than the following:

Bell Communications Research, Inc.

Certain wholly owned subsidiaries of petitioner Pacific Telesis Group have subsidiaries or subsidiaries of subsidiaries that are not wholly owned. These non-wholly owned subsidiaries include:

Cellular Communications, Inc.  
PacTel Meridian Systems  
South Yorkshire Cablevision Limited  
ELT Acquisition Company Limited  
Percom Services Limited (Thailand)  
Mannesmann Mobilfunk GmbH

**PARTIES-Continued**

Pacific Telesis Ireland  
METROPHONES Company Limited  
Sistelcom, S.A.  
Pacific Telesis (Hellas) Limited  
Telecel-Comunicacoes Pessoais, S.A.  
Tokyo Digital Phone Company  
Athens Cellular, Inc.

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**PETITION FOR WRIT OF CERTIORARI**

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**OPINIONS BELOW**

Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case. The opinion of the court of appeals is reported at 940 F.2d 1324 and is included in the Appendix at pp. 1a to 12a. The order of the court of appeals denying rehearing is included in the Appendix at p. 13a. The opinion of the district court is set out in the Appendix at pp. 15a to 24a. The order of the court of appeals granting petitioners' motion to stay the mandate to and including

November 18, 1991 to permit the filing and subsequent disposition of a petition for certiorari, is included in the Appendix at p. 14a.

### **JURISDICTION**

The opinion and judgment of the court of appeals was entered on August 12, 1991. Petitioner's timely petition for rehearing was denied on September 26, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

### **STATUTES INVOLVED**

This case involves section 703(h) of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-2(h), which provides, in pertinent part:

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, \* \* \* provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, \* \* \* .

This case also involves section 404 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1104, which is set out in the Appendix. App., p. 25a.

## STATEMENT OF THE CASE

### A. Nature of the case.

This action challenges petitioner Pacific Bell's decision to use petitioners' long-standing "Net Credited Service" system as a basis for determining eligibility for certain benefits under Pacific Bell's retirement plans. Like many employers, Pacific Bell relies on its employees' length of service as an established and neutral yardstick on which it can base benefits without the threat of a claim of discrimination. Respondent, however, claims that the amount of her service credit incorporates, and thus gives present effect to, an action that was lawful when it occurred in 1972 (when respondent filed a charge of discrimination, but elected not to bring suit), but, under a subsequent amendment to Title VII, would be unlawful if it occurred today.

Previous decisions of this Court and of other circuits have held that employers may rely on seniority for making employment decisions without reopening and revising established seniority dates to take account of past acts that are claimed to have a current discriminatory impact because they are incorporated in an employee's seniority. The court of appeals in this case, by contrast, has held that an employer's reliance on seniority should be deemed to constitute a present act of discrimination unless the employer continually revises established seniority dates to give retroactive effect to new legal requirements, or to eliminate the present effects of long past and closed acts that were not challenged (or were unsuccessfully challenged) at the time.

Under Pacific Bell's service crediting system (which was used for similar purposes by Pacific Bell's predecessor, Pacific Telephone & Telegraph Company, for many years before its divestiture from AT&T in 1984), a "Net Credited Service Date" is continuously maintained for all

employees from their initial hire until their retirement. An employee's Net Credited Service Date consists of the employee's original hiring date adjusted to take account of periods for which no service credit is accrued. As noted by the court of appeals, "[u]nder this system, an employee receives credit for time during which the employee is absent due to a temporary disability, but does not receive credit for time spent on personal leave." App., p. 3a.

Prior to the 1979 enactment of the Pregnancy Discrimination Act ("PDA"), the Bell System companies, including Pacific Telephone & Telegraph Company by whom respondent was employed, classified absences due to pregnancy as personal leaves rather than as disability leaves. That treatment was lawful when it occurred. In 1976, this Court ruled in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) that discrimination based on pregnancy did not violate Title VII. In response, Congress enacted the PDA, which became effective in 1979. 42 U.S.C. § 2000e(k).<sup>1</sup> Pacific Telephone immediately changed its practice and petitioners classified all pregnancy leaves taken after the 1979 enactment of the PDA as disability leaves, for which Net Credited Service has accrued.

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<sup>1</sup> Section 2000e(k) provides:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. \* \* \*

However, petitioners did not retroactively revise their existing employment records or change the existing net credited service dates of employees, such as respondent, who had taken pregnancy leaves prior to 1979.

Respondent Lana Pallas has been employed by Pacific Bell and, previously, Pacific Telephone & Telegraph Company, since 1967. Respondent became pregnant and took a leave in 1972. In accordance with the practice at that time, this absence was treated as a personal leave, rather than as a disability leave. Therefore, respondent did not accrue Net Credited Service during her absence. Respondent filed a charge of discrimination with the EEOC in 1972 challenging the classification of her leave as "personal," but elected not to bring suit.

In September 1987, Pacific Bell amended its retirement plan to include an early retirement option ("ERO") for which employees with certain amounts of Net Credited Service were eligible. In November 1987, respondent applied for the Company's "20-year plan" ERO. Respondent's complaint alleges that she would have been eligible for the 20-year ERO if Pacific Telephone had treated her 1972 absence from work due to pregnancy as a disability leave rather than as a personal leave. Respondent requested that Pacific Bell retroactively redefine her 1972 absence as a disability leave and adjust her accrued Net Credited Service Date accordingly. Pacific Bell denied that request.<sup>2</sup>

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<sup>2</sup> However, on September 12, 1988, Pacific Bell's Employee Benefits Claims Review Committee adjusted respondent's Net Credited Service Date to give respondent service credit for September 6 to October 1, 1972 (a period during which respondent claims she was willing to return to work but was allegedly prevented from doing so), but declined to reclassify the period from July 23 to September 5, 1972, during which

(Continued on following page)

## B. Proceedings below.

Respondent's complaint alleged that Pacific Bell's reliance on Net Credited Service in determining her eligibility for the ERO violated Title VII, the California Fair Employment and Housing Act and the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001, *et seq.*) ("ERISA"). Respondent asserted these claims on behalf of herself and others similarly situated.

The district court dismissed respondent's complaint for failure to state a claim upon which relief could be granted. App., p. 24a. The court held that Pacific Bell's determination to base eligibility for the 1987 ERO on service credit was a facially neutral policy that, under this Court's decision in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), did not violate Title VII.<sup>3</sup> *Id.* at 19a-20a. The district court dismissed respondent's ERISA claim, accepting petitioners' argument that ERISA does not provide an independent standard of fairness or discrimination that regulates an employer's design of the benefit structure of an ERISA plan. *Id.* at 22a.

A divided panel of the Ninth Circuit reversed. The court acknowledged that eligibility for the ERO was based on seniority as measured by an employee's Net

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respondent was indisputably absent and unavailable for work due to pregnancy. With this adjustment, respondent remained ineligible for the 20-year plan ERO as she was still short of the necessary amount of net service credit.

<sup>3</sup> The court dismissed respondent's parallel state-law FEHA claim on the same ground, and because any effort to apply the FEHA beyond the scope of Title VII would be preempted by ERISA. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). App., pp. 21a-22a.

Credited Service date.<sup>4</sup> Nonetheless, the majority concluded that Pacific Bell's seniority system "adopted, and thereby perpetuated, acts of discrimination which occurred prior to enactment of the Pregnancy Discrimination Act." App., p. 6a. For that reason, the court held that Pacific Bell's 1987 decision to base eligibility for the ERO on seniority should be viewed as no different from a "decision to discriminate against Pallas in 1987 on the basis of pregnancy." *Id.* at 6a-7a. In its view, "the criteria adopted in 1987 to determine eligibility for the new benefit program" should be viewed as "not facially neutral," even though eligibility for the ERO concededly turned on the criterion of seniority (not pregnancy). *Id.* at 3a, 5a-6a. The majority further concluded that the respondent had stated a claim for relief under ERISA on the ground that "discrimination constitutes a fiduciary breach for purposes of ERISA." *Id.* at 7a.

The dissenting judge reasoned that eligibility for Pacific Bell's ERO was based on the facially neutral criterion of seniority which is "simply a method of record-keeping and mathematical calculation which determines how long an employee has worked for the employer." App., p. 8a. "[A]ll that the telephone company is currently doing is applying a bona fide seniority system, which is not discriminatory on its face, and is specifically authorized by Congress." *Id.* at 10a. "Neither we nor the telephone company can erase or change history. \* \* \* Appellant's grievance is one that belongs to history; it is not a current violation of law." *Id.* at 10a-11a.

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<sup>4</sup> "To qualify for the benefit, an eligible employee must have accrued twenty years of service. The company measures an employee's length of service by a 'net credited service' system." App., p. 3a.

## REASONS FOR GRANTING THE PETITION

As this Court has emphasized, "Seniority systems \* \* \* are afforded special treatment under Title VII." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977). Thus, from Title VII's inception, section 703(h) has provided that "notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system \* \* \* ." 42 U.S.C. § 2000e-2(h). Nevertheless, the court of appeals has held that employers may not rely on seniority unless they continually revise their employees' regularly established seniority dates to give retroactive effect to new legal requirements. That decision fails to adhere to the plain language of section 703(h), and frustrates the important federal policy that it embodies.

This Court and other courts of appeals have held that reliance on facially neutral seniority and service crediting systems is protected by Title VII even if it gives some present effect to a previous employment decision that was *not* lawful when it was made, but has since become a permanent part of the employee's work history. That result follows *a fortiori* in the present case, where the decision to treat plaintiff's 1972 absence as a personal leave rather than as a disability leave *was* lawful when it was made and respondent elected not to pursue her charge of discrimination at that time. In erroneously holding to the contrary, the Ninth Circuit majority did not even mention the clear language of section 703(h), which should have been dispositive. Nor did it recognize the distinction consistently drawn by this Court – and applied by other courts of appeals – between the present effect given to a past act by a seniority system, on the one hand, and a present act of discrimination, on the other.

The court of appeals' decision is of immense practical and legal importance not only for petitioners, but for all employers. "Seniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this nation." *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 766 (1976). Seniority provides one of the most common and fair means of making a wide variety of employment decisions, ranging from eligibility for pensions and other benefits as in this case, to bidding for job assignments and work schedules, to layoffs, promotions and recalls. Congress recognized this fact when it enacted section 703(h). As this Court has repeatedly held, section 703(h) permits an employer to rely on seniority at all times, not merely if all of the past, component decisions that make up seniority would be valid if current legal requirements were retroactively applied to them. This holding that use of a seniority system is permissible even if it arguably "perpetuates" the effects of past acts is essential if the congressional approval of the use of seniority in section 703(h) is to have any meaning, because, by its very nature, seniority incorporates the results of all previous employment decisions.

If permitted to stand, the court of appeals' decision will undermine the use of seniority rather than freely permit it as Congress intended. The inevitable result will be to force employers either to attempt to reopen and investigate each underlying decision that comprises each employee's seniority to take account of all past acts that might now be thought to have been discriminatory even though they were completely lawful at the time (or, if unlawful, were not subject to a timely challenge), or, alternatively, to abandon the use of seniority altogether. In either event, the will of Congress will have been frustrated.

As this Court has recognized, the "special treatment" [accorded seniority systems under Title VII] strikes a balance between the interests of those protected against discrimination by Title VII and those who work – perhaps for many years – in reliance upon the validity of a facially lawful seniority system. \* \* \* [A]llowing a facially neutral system to be challenged, and entitlements under it to be altered, many years after its adoption would disrupt those valid reliance interests that § 703(h) was meant to protect.

*Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 912 (1989).<sup>5</sup> Thus, even putting aside the practical impossibility of the obligation imposed by the court of appeals continually to reevaluate each component decision that comprises seniority to give retroactive effect to new legal requirements or to take account of time-barred episodes of alleged discrimination, that requirement would frustrate the valid reliance interests of other employees

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<sup>5</sup> Section 112 of the Civil Rights Act of 1991, as recently passed by the Congress, contains an amendment that would allow "a seniority system that has been adopted for an intentionally discriminatory purpose" to be challenged "when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system." 56 Cong. Rec. S15275 (daily ed. Oct. 25, 1991). The amendment does not apply to this case because there is no claim that Pacific Bell's long-standing seniority system was "adopted for an intentionally discriminatory purpose." While the amendment may affect the specific holding of *Lorance v. AT&T Technologies, Inc.*, *supra*, in cases involving seniority systems adopted for an intentionally discriminatory purpose, it does not affect its broader discussion of the purposes of section 703(h).

regarding such matters as job assignments, work schedules, promotions and layoffs that Congress intended to protect.

Prompt review by this Court is warranted to resolve the conflict in the circuits on this issue, and to alleviate the uncertainty and confusion that the Ninth Circuit's decision has injected into the previously well-understood principles applied to seniority and service crediting systems by this Court. The Ninth Circuit's rationale appears to turn on the fact that the benefits program at issue – although basing eligibility on seniority – was a “new” program adopted subsequent to the enactment of the PDA. This is an insupportable interpretation of this Court's decisions construing section 703(h), which sustain the use of seniority systems for determining terms and conditions of employment regardless of whether the programs at issue are “new” programs or “old” programs. *Infra*, pp. 18-20. No other circuit has adopted the Ninth Circuit's novel and highly restrictive interpretation of section 703(h).

The effect of the Ninth Circuit's attempt narrowly to confine section 703(h) will be to create a strong incentive for employers to freeze existing benefit programs, rather than revise them as they otherwise would to take account of new economic and workplace conditions. Nor are the effects of the decision below limited to a few businesses or to the Ninth Circuit. Many employers with national operations both within and outside the Ninth Circuit base employment decisions on seniority or service credit. If they are to treat their employees equally, they must attempt to conform to the Ninth Circuit's decision nationwide (by freezing benefits programs, abandoning use of seniority altogether, or attempting in some manner retroactively to reevaluate each component decision that comprises the seniority dates contained in company records),

even though other circuits have rendered conflicting decisions. Moreover, the problems created by the Ninth Circuit's approach are not confined to the PDA. Employers could face demands that they revise seniority dates to give retroactive effect to all new legal requirements governing employment decisions (such as, for example, the Family Leave bills now pending in Congress) that are regularly imposed in this rapidly evolving area. The grant of certiorari is necessary to prevent these wide-ranging and unwarranted effects of the Ninth Circuit's erroneous interpretation of section 703(h).

Certiorari should also be granted to review the Ninth Circuit's decision that ERISA, independently of the provisions of Title VII, prohibits an employer from "discriminating" in determining what benefits to provide and to whom under an ERISA benefit plan. The Second, Third, Sixth, Seventh and Eighth Circuits have rendered conflicting decisions, holding that ERISA's fiduciary duty requirement imposes no independent standard of discrimination or fairness to govern an employer's design of an ERISA benefit plan. Congress refrained from imposing such an undefined prohibition to encourage employers to create and fund such purely voluntary plans. The Ninth Circuit's contrary decision thus undermines Congress' intent in enacting ERISA, as well as Title VII.

**I. THE DECISION OF THE COURT OF APPEALS IS IRRECONCILABLE WITH THE PLAIN LANGUAGE OF SECTION 703(h) AND WITH THIS COURT'S DECISIONS APPROVING THE USE OF STABLE SENIORITY SYSTEMS FOR MAKING EMPLOYMENT DECISIONS.**

**A. This Court's decisions interpret section 703(h) in accord with its plain language to permit the use of seniority despite its alleged present discriminatory impact.**

Beginning with *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976), this Court has consistently

sustained the use of stable and predictable seniority systems to make employment decisions. In *Franks*, the Court held that, where a timely claim of discrimination is brought, section 703(h) does not prevent the district court from remedying a violation of Title VII that exists *independently* of the operation of the seniority system by awarding retroactive seniority to the individuals discriminated against. *Id.* at 758. However, the Court explicitly recognized that section 703(h) does bar claims like those in the present case, in which the plaintiff claims that the use of seniority itself has given a long past and closed act a present discriminatory effect on current rights and benefits:

[T]he thrust of [section 703(h)] is directed toward defining what is and what is not an illegal discriminatory practice in instances *in which the post-act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act.*

*Id.* at 761 (emphasis added). In reaching that conclusion, this Court relied not only on the plain language of section 703(h), but on the legislative history of Title VII. That history clearly indicates that, even though an employee's seniority may have been adversely affected by a previous act of discrimination, "any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title." *Id.* at 760-761 n. 16 (quoting Department of Justice Statement on Title VII). The legislative history also establishes that Title VII was *not* intended to "require an employer to change existing seniority lists," as respondent contends in this case. *Id.*

*Franks'* recognition that section 703(h) was intended to bar claims such as those here formed the basis for this Court's subsequent decision in *Teamsters v. United States*, 431 U.S. 324 (1977). Plaintiffs claimed that, before Title

VII was enacted, the employer had engaged in a pattern or practice of racial discrimination, and that the employer's use of seniority after the enactment of Title VII for the purpose of determining current "benefits, such as vacations, pensions, and other fringe benefits" (*id.* at 343) was unlawful because it had the effect of perpetuating the effects of those previous acts of discrimination. The district court and the court of appeals had held that this use of seniority violated Title VII because it " 'locked' minority workers into inferior jobs and perpetuated prior discrimination by discouraging transfers to jobs as line drivers." *Id.* at 344.

This Court reversed, holding that section 703(h) immunizes an employer from liability for the discriminatory impact of using seniority as a basis for current determinations of benefits and other conditions of employment, even though, as is claimed to be true in this case, "the seniority system operates to carry the effects of the earlier discrimination into the present." *Id.* at 344-345 n. 27. Specifically, despite the fact that facially neutral seniority systems may be viewed as "one kind of practice 'fair in form, but discriminatory in operation' \* \* \* which perpetuates the effects of prior discrimination" that would otherwise violate Title VII (*see Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)),<sup>6</sup> "both the literal terms of

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<sup>6</sup> Were it not for § 703(h), the seniority system in this case would seem to fall under the *Griggs* rationale. The heart of the system is its allocation of the choicest jobs, the greatest protection against layoffs, and other advantages to those employees who have been line drivers for the longest time. Where, because of the employer's prior intentional discrimination, the line drivers with the longest tenure are without exception white, the advantages of the seniority

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§ 703(h) and the legislative history of Title VII demonstrate that Congress considered this very effect of many seniority systems and extended a measure of immunity to them." 431 U.S. at 350. This Court reiterated that "the unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII. As the legislative history shows, this was the intended result even where the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than Negroes" and the use of seniority, therefore, "inevitably tends to perpetuate the effects of pre-Act discrimination in such cases." 431 U.S. at 352-353. Accordingly, "*we hold that an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination.*" *Id.* at 353-354 (emphasis added).

In *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), this Court extended the rationale of *Teamsters* to a case where the use of seniority perpetuated the effects of discriminatory acts that, unlike those in *Teamsters* and in this case, were *unlawful* when they occurred but had not been challenged at that time. In *Evans*, the plaintiff was forced to resign in 1968 after she married. Resigning employees lost all seniority. United subsequently ended this discriminatory practice, but when plaintiff was rehired United gave her no seniority credit for the period of her forced resignation. This Court assumed that the 1968 forced resignation would have been found unlawful

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system flow disproportionately to them and away from Negro and Spanish-surnamed employees who might by now have enjoyed those advantages had not the employer discriminated before the passage of the Act.

*Id.* at 349-350 (emphasis added).

had it been subject to a timely challenge, and addressed the question of "whether the employer is committing a second violation of Title VII by refusing to credit her with seniority for any period prior to February 1972." *Id.* at 554. The Court again ruled that a seniority system does not violate Title VII even though it "gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination." *Id.* at 557.

[A] challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer.

*Id.* at 560.

Thus, even if, despite this Court's decision in *Gilbert, supra*, petitioners' 1972 treatment of respondent's pregnancy had been unlawful when it occurred (which it was not), *Evans* makes it clear that petitioners were:

entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by § 706(d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed.

*Id.* at 558.<sup>7</sup>

In *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982), this Court held that section 703(h) is not confined to seniority systems adopted before the passage of Title

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<sup>7</sup> In the present case, respondent filed a timely charge with the agency with respect to her 1972 leave, but failed to pursue that charge by filing a timely complaint within 90 days after receiving her right-to-sue letter as prescribed in 42 U.S.C. § 2000e-5(f).

VII, but extends as well to protect newly adopted seniority systems, even though the result of such "new" uses of seniority is to perpetuate the effects of earlier acts of discrimination. Relying on the "plain language of § 703(h)," which, on its face, makes no distinction between "old" and "new" uses of seniority, this Court held that the statute insulates the alleged discriminatory impact of such systems from challenge under Title VII regardless of when they were adopted. *Id.* at 77. Any other result not only would be inconsistent with the language of section 703(h), but would discourage employers from "modifying pre-Act seniority systems or post-Act systems whose adoption was not timely challenged." *Id.* at 71. This Court emphasized that:

Our prior decisions have emphasized that "seniority systems are afforded special treatment under Title VII itself," *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977), and have refused to narrow § 703(h) by reading into it limitations not contained in the statutory language. In *Teamsters v. United States*, \* \* \* we held that § 703(h) exempts from Title VII the disparate impact of a bona fide seniority system even if the differential treatment is the result of pre-Act racially discriminatory employment practices. Similarly, by holding that "[a] discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed," *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977), the Court interpreted § 703(h) to immunize seniority systems which perpetuate post-Act discrimination. Thus, taken together, *Teamsters* and *Evans* stand for the proposition stated in *Teamsters* that "[s]ection 703(h) on its face immunizes all bona fide seniority systems,

and does not distinguish between the perpetuation of pre- and post-Act" discriminatory impact. \* \* \* *Section 703(h) makes no distinction between seniority systems adopted before its effective date and those adopted after its effective date.*

*Id.* at 75-76 (emphasis added).

The court of appeals in this case made no attempt to apply the distinction drawn in this Court's cases between a current act of discrimination, on the one hand, and the current impact given to a prior act by seniority, on the other. To the contrary, the panel reasoned that Pacific Bell had violated Title VII because:

*In 1987, Pacific Bell instituted a program that adopted, and thereby perpetuated, acts of discrimination which occurred prior to enactment of the Pregnancy Discrimination Act.*

App., p. 6a (emphasis added). *Evans*, however, holds exactly the opposite: *Evans* ruled that even though United's seniority system "does indeed have a continuing impact on [plaintiff's] pay and fringe benefits" as a result of United's previous act of sex discrimination, United's practice of basing current pay and benefits on seniority, with the "present effect" of adopting and "perpetuat[ing]" that previous act of discrimination, was "neutral in its operation." 431 U.S. at 557-558. Accordingly, it was not a present violation of Title VII.

**B. The fact that Pacific Bell's 1987 ERO was a "new" program is irrelevant. Section 703(h) protects both old and new programs based on seniority.**

The court of appeals attempted to distinguish *Teamsters* and *Evans*, primarily on the ground that the alleged "discriminatory program" at issue was a new program that had been adopted in 1987. App., pp. 5a-6a. Thus, the majority concluded, "this is not a belated attempt to

litigate the discriminatory impact of a pre-Pregnancy Discrimination Act program." *Id.* Rather, "Pallas challenges the criteria adopted in 1987 to determine eligibility for the new benefit program." *Id.*

This analysis disregards both the clear language of section 703(h) and the central rationale of this Court's decisions. The very point of section 703(h) as construed in *Teamsters* and *Evans* is that a current decision to base pay or other benefits on seniority, as in the present case, "shall not be an unlawful employment practice" even though such use of seniority may give a previous act a current "impact." The issue in *Evans* was not whether plaintiff had filed a timely claim. Rather, the question was whether, given the company's discriminatory action in 1968, "the employer is committing a second violation of Title VII by refusing to credit her with seniority for any period prior to February 1972" when she returned to work. 431 U.S. at 554. This Court held that despite the 1972 impact of seniority on her pay and other benefits "she has not alleged facts establishing a violation since she was rehired in 1972." *Id.* at 559.

Thus, the court of appeals' conclusion that respondent had made a timely challenge to Pacific Bell's "new" use of her Net Credited Service Date to determine eligibility for the ERO in 1987 does not address the controlling legal principle: It was not a current act of discrimination for Pacific Bell to rely on Net Credited Service as the criterion for determining eligibility for a retirement benefit. Nothing in the language of section 703(h) or the rationale of this Court's decisions turns on whether the employee benefit program or wage scale at issue is an "old" wage scale or benefit program or a "new" wage scale or benefit program.<sup>8</sup> *Teamsters* and *Evans* clearly

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<sup>8</sup> Indeed, in *Bazemore v. Friday*, 478 U.S. 385 (1986) (*infra*, p. 22), on which the panel relies, the pay system at issue was an

uphold all programs that base current pay or benefits on seniority, whether they are "new" programs or "old" programs (or, as is true in this case, amendments to old programs). Clearly, if, as this Court held in *American Tobacco, supra*, section 703(h) immunizes the adoption and the application of entirely new seniority systems after the enactment of Title VII despite their conceded discriminatory impact, Pacific Bell's use of its *existing* and long-standing service crediting system for the purpose of determining eligibility for its 1987 ERO was also lawful.

**C. Eligibility for Pacific Bell's 1987 ERO was based on the facially neutral criterion of seniority, not pregnancy.**

The court of appeals' majority also suggested that *Evans* and *Teamsters* are not on point because the "net credit system used to calculate eligibility under the Early Retirement Opportunity is *not facially neutral*" but "facially discriminates against pregnant women." App., p. 6a (emphasis added). The panel stated that under the 1987 ERO, Pacific Bell employed "a method of calculating employee service time that does not credit pregnancy leaves taken prior to 1979 but credits temporary disability leaves taken during the same period." *Id.* at 2a. The panel erroneously implies that respondent's 1972 pregnancy was expressly considered by the company in determining her eligibility for the ERO, stating that the company

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"old" system adopted prior to the implementation of Title VII. Conversely, in *Farris v. Board of Ed. of City of St. Louis*, 576 F.2d 765 (8th Cir. 1978) (*infra*, p. 24), the pay practice upheld under *Evans* was an employer's current salary schedule basing pay on seniority, which plaintiff claimed had been unlawfully reduced as a result of a previous failure to credit her maternity leave.

"informed [respondent] that she was not eligible for the benefit because, as a result of a pregnancy-related leave she took in 1972," she lacked the necessary seniority. *Id.* at 3a.

To the contrary, neither Pacific Bell's 1987 ERO nor any of its other benefit programs employed eligibility criteria that depended on, or even mentioned, whether an employee had taken a pregnancy leave, either before or after 1979. The complaint itself alleges that "at all times relevant herein, defendants maintained a Net Credited Service Date for each of defendants' employees" which they used "*to measure an employee's length of service for purposes of determining entitlement to and eligibility for*" benefits. ER 8 (emphasis added).<sup>9</sup> As the dissenting judge in the court of appeals correctly recognized:

The appellee telephone company has simply applied a seniority system, which it uses as the criterion for according many kinds of employee benefits, and appellant simply did not have enough seniority to qualify for the early retirement which she sought.

App., p. 8a (footnote omitted).

Thus, eligibility for benefits for Pacific Bell's 1987 ERO did not, on its face, turn on "pregnancy vs. disability," as the panel implies. Rather, it turned on the facially neutral criterion of seniority, which included the period of disability leaves, but not "personal" leaves. Pacific Bell's seniority system did not, on its face, discriminate by "assign[ing] men twice the seniority that women receive for the same amount of time served \* \* \*," thus treating "similarly situated employees differently." *Lorance v. AT&T Technologies, Inc.*, *supra*, 490 U.S. at 912 &

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<sup>9</sup> The citation is to the Excerpt of Record filed in the court of appeals.

n. 5. Rather, on its face it assigned all employees service credit for disability leaves, but not for personal leaves, treating all similarly situated employees the same. Respondent's complaint is not with the Pacific Bell seniority system itself, which on its face properly differentiates between personal leaves and disability leaves. Rather, it is with Pacific Telephone's 1972 decision to treat her pregnancy leave as a personal leave – a decision that was lawful when it occurred.

The court of appeals' heavy reliance on *Bazemore v. Friday*, 478 U.S. 385 (1986) (App., p. 6a) was clearly misplaced. *Bazemore* did not involve the alleged current discriminatory impact of basing pay or other benefits on seniority. Rather, in *Bazemore*, the employer commenced the practice of paying blacks less than whites for the same work before the effective date of Title VII, and continued that practice after Title VII became effective. *Seniority was not involved at all*. This Court merely held that the fact that an unlawful employment practice which *currently bases an employee's pay on the forbidden criterion of race* (not seniority) had commenced before Title VII became effective could not immunize the employer from liability for its continuing and current acts of basing pay on race. At the same time, however, the Court stressed "recovery may not be permitted for pre-1972 acts of discrimination." *Id.* at 395. The court of appeals' sweeping extension of *Bazemore* beyond current acts of discrimination to encompass the current effects given by a seniority system to past acts that were lawful when they occurred, thus giving retroactive effect to new legal requirements, is irreconcilable with section 703(h) as it has been interpreted and applied by this Court.

In this case, by contrast to *Bazemore*, Pacific Bell does not currently base the availability of any employee benefit on the forbidden criterion of pregnancy, but rather on

the lawful and neutral criterion of seniority. Petitioners did not establish respondent's seniority date in 1987. Rather, the pre-1979 rule classifying pregnancy leaves as personal leaves for which no seniority credit would be given *was applied when plaintiff took her leave in 1972. Plaintiff's resulting seniority date was then established throughout the entire period of her employment with the company.* The only action taken by Pacific Bell in 1987 was to apply respondent's already established and facially neutral seniority date – which necessarily incorporated the results of all previous decisions affecting seniority – to determine her eligibility for the 1987 ERO. In so doing, it did not refer to pregnancy at all. The only reason that respondent's 1972 pregnancy ever appeared in the record was because she requested the company retroactively to *change* her previously established seniority date as it appeared in the company records. That is the very thing that, under section 703(h), the company need not do. Prior to the present decision, no court had held that a system for determining employment benefits, which "on its face" does not refer in any way to a forbidden criterion, should nevertheless be treated as "facially discriminatory."

## II. THE PANEL'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS REJECTING SIMILAR CLAIMS UNDER TITLE VII.

Review is also necessary to resolve a conflict in the circuits. The Second and Eighth Circuits have rejected claims indistinguishable from those of respondent here. *See Schwabenbauer v. Bd. of Educ. of City of Olean*, 777 F.2d 837 (2d Cir. 1985) (rejecting plaintiff's claim that her 1972 dismissal constituted a current violation of Title VII since she would have had enough service to receive tenure but for defendant's failure to credit her 1970 maternity leave);

*Farris v. Board of Ed. of City of St. Louis*, 576 F.2d 765 (8th Cir. 1978) (rejecting plaintiff's claim that defendant's current salary schedule, which depended on length of service, violated Title VII since plaintiff's mandatory maternity leave absences taken before 1972 were not credited). See also *Trabucco v. Delta Airlines*, 590 F.2d 315 (6th Cir. 1979); *Simmons v. South Carolina State Ports Authority*, 495 F. Supp. 1239 (D.S.C. 1980), *aff'd*, 694 F.2d 63 (4th Cir. 1982).

Thus, in *Schwabenbauer*, the Second Circuit noted that Title VII did not apply to school boards until 1972 and that defendant's failure to credit plaintiff's maternity leave in 1970 was not unlawful at that time. The court ruled that to apply the 1972 statute to require such credit in determining whether plaintiff had "tenure" precluding her dismissal in 1972 would improperly:

give retroactive effect to a statute creating new rights where none had previously existed. The manifest injustice of such *ex post facto* imposition of civil liability is reflected in the general rule of construction that absent clear legislative intent statutes altering substantive rights are not to be applied retroactively \* \* \* .

777 F.2d at 840 (emphasis in original) (quoting *Weise v. Syracuse University*, 522 F.2d 397, 411 (2d Cir. 1975)).

Precisely the same analysis applies to the court of appeals' erroneous application of the 1979 Pregnancy Discrimination Act in this case to require that respondent's seniority date be retroactively revised so that she receives service credit for her 1972 pregnancy leave.

### III. THE PANEL'S DECISION ALSO CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS HOLDING THAT AN EMPLOYER DOES NOT ACT AS A FIDUCIARY IN DESIGNING THE BENEFIT STRUCTURE OF AN ERISA PLAN.

The majority summarily concludes, in a single paragraph, that "discrimination constitutes a fiduciary breach

for purposes of ERISA." App., p. 7a. But this Court has explicitly stated that ERISA "*does not itself proscribe discrimination in the provision of employee benefits.*" *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983) (emphasis added). The court of appeals' contrary decision constitutes an unprecedented revision of settled ERISA principles and is in conflict with decisions in the Second, Third, Sixth, Seventh and Eighth Circuits.

Those other courts have correctly held that employer decisions to create, allocate benefits under, amend or even terminate a benefit plan are not to be judged by fiduciary standards. *See, e.g., Fletcher v. The Kroger Co.*, 942 F.2d 1137, 1139 (7th Cir. 1991) (employer's decision to provide special retirement benefits to employees at some plants but not at others did not violate ERISA's fiduciary duty standards because an employer does not act as a fiduciary when it makes the initial decision as to what the plan will provide); *Adams v. LTV Steel Mining Co.*, 936 F.2d 368 (8th Cir. 1991); *Belade v. ITT Corporation*, 909 F.2d 736, 737-738 (2d Cir. 1990) ("an employer's decision to exclude certain employees from the design of an early retirement program" does not implicate ERISA fiduciary duties); *Musto v. American General Corp.*, 861 F.2d 897, 911 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989) ("there is a world of difference between administering a welfare plan in accordance with its terms and deciding what those terms are to be. A company acts as a fiduciary in performing the first task, but not the second"); *Trenton v. Scott Paper Co.*, 832 F.2d 806, 809 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988) (single-employer plan did not breach fiduciary duty by discriminating in adopting ERO for the benefit of some participants but not others); *Amato v. Western*

*Union Intern., Inc.*, 773 F.2d 1402, 1416 (2d Cir. 1985).<sup>10</sup> As the court of appeals explained in *Musto, supra*:

The case law \* \* \* makes it clear that when an employer decides to establish, amend, or terminate a benefits plan, as opposed to managing any assets of the plan and administering the plan in accordance with its terms, its actions are not to be judged by fiduciary standards.

861 F.2d at 912.

ERISA does contain specific restrictions on the substantive provisions of pension plans.<sup>11</sup> These specific statutory provisions, however, are the sole limits which ERISA places on the terms of an employer's plan. No provision of ERISA empowers a court to review the substantive provisions of an employer's plan for conformity to any standard of "reasonableness," "fairness" or "discrimination."<sup>12</sup> An employer may be a fiduciary in *carrying out* the provisions of a plan that it has designed, but it

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<sup>10</sup> The Ninth Circuit's decision is at odds with previous decisions within that circuit as well. See *Lea v. Republic Airlines, Inc.*, 903 F.2d 624, 631 (9th Cir. 1990); *Amalgamated Clothing & Textile Workers v. Murdock*, 861 F.2d 1406, 1419 (9th Cir. 1988); *West v. Greyhound Corp.*, 813 F.2d 951, 955-956 (9th Cir. 1987) (single-employer plan changes "are not to be reviewed by fiduciary standards").

<sup>11</sup> For example, single-employer pension plans must begin to vest employees by, at latest, their fifth year. 29 U.S.C. § 1053.

<sup>12</sup> [A]n employer has no affirmative duty to provide employees with a pension plan. H.Rep. No. 93-807, 93rd Cong., 2d Sess. (1974), reprinted in [1974] U.S.Code Cong. and Ad.News, 4670, 4677. In enacting ERISA, Congress continued its reliance on *voluntary* action by employers by granting substantial tax advantages for the creation of qualified retirement programs. *Id.* Neither Congress nor the courts are

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is not a fiduciary in determining the design of the plan itself. "ERISA permits employers to wear 'two hats.'" *Amato v. Western Union Intern., Inc.*, 773 F.2d 1402, 1416 (2d Cir. 1985). Employers "assume fiduciary status 'only when and to the extent' that they function in their capacity as plan administrators" – not when they design their pension plans and act as a corporate employer. *Id.* at 1416-1417 (quoting *Amato v. Western Union Intern., Inc.*, 596 F. Supp. 963, 968 (S.D.N.Y. 1984)). Thus, while ERISA provides for judicial review of the *administration* of ambiguous provisions of a plan to determine whether those provisions have been construed in an arbitrary or capricious manner,<sup>13</sup> review of an employer's selection of

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involved in either the decision to establish a plan or in the decision concerning which benefits a plan should provide. In particular, courts have no authority to decide which benefits employers must confer upon their employees; these are decisions which are more appropriately influenced by forces in the marketplace and, when appropriate, by federal legislation. Absent a violation of federal or state law, a federal court may not modify a substantive provision of a pension plan.

*Moore v. Reynolds Metals Co. Retirement Program*, 740 F.2d 454, 456 (6th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985) (footnote and citation omitted; emphasis added).

<sup>13</sup> The court of appeals erroneously implies, without elaboration, that respondent may have stated a claim challenging the way in which the plan was administratively interpreted and applied to her, rather than the design of the plan's benefit structure itself. It states that respondent "challenges the manner in which the Early Retirement Opportunity program was applied to her" and that "[c]alculation of the service term for purposes of eligibility in the program is an act subject to

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which benefits to provide to particular classes of employees is not intended under ERISA.

The court of appeals' reliance on *Elser v. I.A.M. Nat. Pension Fund*, 684 F.2d 648 (9th Cir. 1982), *cert. denied*, 464 U.S. 813 (1983) (App., p. 7a) was misplaced, because *Elser* involved a multi-employer plan, established by collective bargaining under the Taft-Hartley Act, 29 U.S.C. § 186(c)(5), under which a pooled fund was administered jointly by labor and management representatives.<sup>14</sup> In such a case, the plan's administrators do not act as an employer in deciding what benefits to provide and to whom they will be provided, but rather as administrators in managing the plan assets that have already been provided through collective bargaining. In *Musto, supra*, the court of appeals explained this important – and previously well-understood – distinction between reviewing the terms of a *multi-employer* pension plan for the general fairness of its "allocation" of benefits and reviewing

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review for breach of fiduciary duty." App., p. 7a. However, there is no issue of improper plan interpretation or administration in this case. The court of appeals failed to mention that respondent's complaint admits that the *plan itself* made all of its benefits dependent on Net Credited Service (ER 8, ¶ 34; ER 10, ¶ 40), and that her Net Credited Service did not include the period of her pre-1979 pregnancy leave (ER 9, ¶ 38). The panel also failed to note that the district court granted respondent leave to amend to attempt to state a claim for improperly administering the plan by failing to interpret and apply it in accordance with its provisions. Respondent declined that opportunity. Thus, as the district court correctly concluded, no issue of alleged misinterpretation of the plan in determining respondent's net credited service is presented.

<sup>14</sup> See also, e.g., *Winpisinger v. Aurora Corp. of Ill., Etc.*, 456 F. Supp. 559 (N.D. Ohio 1978).

the terms of a *single-employer* plan such as that in this case:

In amending a *multi-employer* plan, where the level of contributions of each participating employer has generally been set by collective bargaining, the trustees "affect the allocation of a finite plan asset pool between participants," as defendants point out in their brief, *and hence act as plan administrators subject to a fiduciary duty*. But when, as here, there is only one employer, there is normally no "plan asset pool" to be affected. *In amending a single employer plan, therefore, the company normally acts in its role as employer, not in its role as fiduciary*.

861 F.2d at 912 (emphasis added).

An employer's plan design decisions are of course subject to independent legal requirements, such as Title VII.<sup>15</sup> But *ERISA itself* provides no independent standard or prohibition of "discrimination" that restricts or regulates an employer's decision as to what benefits to provide or how they should be allocated among its employees. Congress carefully refrained from importing such an undefined and wide-ranging standard of judicial review to avoid the deterrent effect such review would obviously have on employers' willingness to create and

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<sup>15</sup> Congress specifically declined to amend ERISA to include a substantive prohibition of discrimination analogous to that of Title VII on the ground that the matter was adequately dealt with by Title VII. Senator Mondale's proposed amendment to ERISA that would have prohibited discrimination based on race, color, national origin or sex by any plan covered by ERISA, was withdrawn on the ground that discrimination was adequately dealt with under Title VII. 119 Cong. Rec. 24456-24457, 30410 (1973). See also 120 Cong. Rec. 4276 (1974) (remarks of Ms. Abzug and Mr. Dent).

fund such purely voluntary plans for the benefit of their employees.

The court of appeals' decision in this case injects new uncertainty into this previously settled area of ERISA law, and prevents employers from knowing with any assurance what requirements the law imposes on their design of a benefit plan. The conflict in the circuits and the broad importance of this issue to the willingness of employers to revise old plans and create new plans for the benefit of their employees make this issue independently worthy of this Court's attention.

### CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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## **APPENDICES**



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APPENDIX A  
FOR PUBLICATION

LANA PALLAS,	)	No. 90-15559
	)	D.C.No.
<i>Plaintiff-Appellant,</i>	)	CV-89-2373-DLJ
v.	)	OPINION
	)	
PACIFIC BELL; PACIFIC	)	
TELESIS, et al.,	)	
<i>Defendants-Appellees.</i>	)	

Appeal from the United States District Court  
for the Northern District of California  
D. Lowell Jensen, District Judge, Presiding

### Argued and Submitted

May 15, 1991 - San Francisco, California

Filed August 12, 1991

Before: Mary M. Schroeder and Jerome Farris, Circuit Judges, and Edward Dumbauld,\* District Judge.

Opinion by Judge Schröder;  
Dissent by District Judge Dumbauld

\*Honorable Edward Dumbauld, Senior United States District Judge for the Western District of Pennsylvania, sitting by designation.

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C. Douglas Floyd, Pillsbury, Madison & Sutro, San Francisco, California, for the defendants-appellees.

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### OPINION

SCHROEDER, Circuit Judge:

Lana Pallas filed this suit against her employer, Pacific Bell, and its predecessor companies (collectively "Pacific Bell"), claiming that the company has discriminated against her on the basis of gender and pregnancy. Pacific Bell denied her retirement benefits in 1987 based on a method of calculating employee service time that does not credit pregnancy leaves taken prior to 1979 but credits temporary disability leaves taken during the same period. Pallas brought this action under the Pregnancy Discrimination Act provisions of Title VII, 42 U.S.C. § 2000e *et seq.*; ERISA, 29 U.S.C. §§ 1001 *et seq.*; and the California Fair Employment and Housing Act, Cal. Gov't Code § 12900 *et seq.*

The district court interpreted Pallas's complaint to allege only that discrimination occurred prior to 1979, when the law did not require employers to treat pregnant women like temporarily disabled men. *See General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976). Thus, the district court dismissed the complaint

for failure to state a federal claim. Because we hold that the complaint states a claim for discrimination occurring in 1987 when Pacific Bell denied Pallas retirement benefits, we reverse. See *Bazemore v. Friday*, 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986).

### FACTS

In 1987, Pacific Bell instituted a new retirement benefit for management employees called the "Early Retirement Opportunity." To qualify for the benefit, an eligible employee must have accrued twenty years of service. The company measures an employee's length of service by a "net credited service" system. Under this system, an employee receives credit for time during which the employee is absent due to a temporary disability, but does not receive credit for time spent on personal leave. Prior to enactment of the Pregnancy Discrimination Act, Pacific Bell required employees disabled by pregnancy to take personal leaves. After 1979, Pacific Bell changed its policy to allow employees with pregnancy-related disabilities to take disability leaves. Under the current "net credited service" system, employees disabled by pregnancy prior to 1979 do not receive service credit for their pregnancy-related leaves.

Pallas, who had been employed by Pacific Bell and its predecessor companies since 1967, applied for the Early Retirement Opportunity. By letter dated October 11, 1988, the company informed her that she was not eligible for the benefit because, as a result of a pregnancy-related leave she took in 1972, she was three to four days short of the necessary amount of service credit. This suit followed.

## DISCUSSION

The Pregnancy Discrimination Act amended Title VII to redress discrimination based on a woman's pregnancy. See 42 U.S.C. § 2000e(k); *Newport News Shipbuilding & Dry Dock Co. v EEOC*, 462 U.S. 669, 684, 103 S.Ct. 2622, 2631, 77 L.Ed.2d 89 (1983) ("The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex"). The Act requires employers to treat pregnancy disabilities in the same manner as other temporary medical disabilities for "all employment-related purposes, including receipt of benefits under fringe benefit programs." 42 U.S.C. § 2000e(k).<sup>1</sup>

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<sup>1</sup> Section 703(a) of Title VII provides that it is an "unlawful employment practice" for an employer:

- (1) . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). Congress amended Title VII in 1978 to provide that:

[t]he terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical

(Continued on following page)

The district court dismissed Pallas's Title VII claim on the basis of a series of Supreme Court decisions interpreting a special provision of Title VII concerning seniority systems, 42 U.S.C. § 2000e-2(h). *See, e.g., Lorange v. AT & T Technologies, Inc.*, 490 U.S. 900, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977). In this line of decisions, the Supreme Court held that disparate impacts resulting from a bona fide seniority system that is facially neutral must be challenged within the statute of limitations from the time the system is adopted; with a facially neutral system, the discriminatory act occurs at the time of adoption and subsequent applications do not constitute continuing violations. *See Lorange*, 490 U.S. at 911-13, 109 S.Ct. at 2268-69; *Evans*, 431 U.S. at 557-58, 97 S.Ct. at 1888-89.

The district court erred in relying on *Evans* and its progeny. These cases are inapposite in two determinative respects. First, the discriminatory program which gave rise to this suit, the Early Retirement Opportunity, was instituted in 1987. This is not a belated attempt to litigate the discriminatory impact of a pre-Pregnancy Discrimination Act program. Pallas challenges the criteria

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(Continued from previous page)

conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . .

42 U.S.C. § 2000e(k) (Pregnancy Discrimination Act).

adopted in 1987 to determine eligibility for the new benefit program. The claim could not have been brought earlier. Second, the net credit system used to calculate eligibility under the Early Retirement Opportunity is not facially neutral. The system used to determine eligibility facially discriminates against pregnant women. The system distinguishes between similarly situated employees: female employees who took leave prior to 1979 due to a pregnancy-related disability and employees who took leave prior to 1979 for other temporary disabilities.

The controlling Supreme Court precedent is *Bazemore v. Friday*, 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986). In *Bazemore*, the employer had, prior to the enactment of Title VII, maintained two separate, racially segregated work forces and paid whites more than blacks. The Court held that pay disparities which remained after the enactment of Title VII were unlawful. "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." 478 U.S. at 395-96, 106 S.Ct. at 3006. Although the employer was not liable for acts of discrimination that occurred prior to the enactment of Title VII, the Court held that an employer could be held liable for discrimination perpetuated after the Act took effect. *Id.* at 395, 106 S.Ct. at 3006.

In 1987, Pacific Bell instituted a program that adopted, and thereby perpetuated, acts of discrimination which occurred prior to enactment of the Pregnancy Discrimination Act. While the act of discriminating against Pallas in 1972 is not, itself, actionable, Pacific Bell is liable for its decision to discriminate against Pallas in 1987 on

the basis of pregnancy. Pallas's complaint states a valid claim under Title VII.

For similar reasons, the district court erred in dismissing Pallas's claims under the California Fair Employment and Housing Act, Cal. Gov't. Code § 12900 *et seq.* The FEHA is based on Title VII, making it an unlawful business practice to "refuse to allow a female employee affected by pregnancy, childbirth or related medical conditions . . . [t]o receive the same benefits or privileges of employment granted by that employer to other persons not so affected . . . including to take disability or sick leave. . . ." Cal. Gov't Code § 12945(b) (1) Because Pallas has stated a Title VII claim, she has also stated a claim under the FEHA.

Pallas has also stated a claim cognizable under ERISA. Pallas challenges the manner in which the Early Retirement Opportunity program was applied to her. Calculation of the service term for purposes of eligibility in the program is an act subject to review for breach of fiduciary duty. *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1502-03 (9th Cir. 1984). Pallas alleges that Pacific Bell breached its fiduciary duty by failing to act in the interests of plan participants. Discrimination constitutes a fiduciary breach for purposes of ERISA. *See, e.g., Elser v. I.A.M. National Pension Fund*, 684 F.2d 648 (9th Cir. 1982), *cert. denied*, 464 U.S. 813, 104 S.Ct. 67, 78 L.Ed.2d 82 (1983). The allegations in the complaint are sufficient to support an ERISA claim.

The judgment of the district court is REVERSED and the case is REMANDED.

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DUMBAULD, District Judge, dissenting:

Respectfully, and regretfully, I dissent. Appellant portrays to us, in the words of an English poet,

"a melancholy tale  
Of things done long ago, and ill-done."<sup>1</sup>

In my interpretation of Congressional legislation<sup>2</sup> and authoritative case law<sup>3</sup> we confront a situation which we have no power to alleviate or remedy. The appellee telephone company has simply applied a seniority system,<sup>4</sup> which it uses as the criterion for according many kinds of employee benefits, and appellant simply did not have enough seniority to qualify for the early retirement which she sought.

A seniority system is simply a method of record-keeping and mathematical calculation which determines how long an employee has worked for the employer. Economics has been called "the dismal science" and a rigorous economist might exclude all time not spent by

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<sup>1</sup> From memory, I think John Ford was the author of these lines.

<sup>2</sup> See 42 U.S.C. 2000-e(k), 2000c-2(a) and 2000e-2(h), which will be discussed more fully hereinafter.

<sup>3</sup> See *United Airlines v. Evans*, 348 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977) and *Bazemore v. Friday*, 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986), which will be discussed more fully hereinafter.

<sup>4</sup> Surviving from its predecessor company before the celebrated antitrust case resulting in the breakup of the old A.T. & T. system. See *U.S. v. Western Electric Co., et al.*, 552 F. Supp. 131 (D.D.C. 1982, *aff'd*. 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 492 (1983); further opinions in 569 F. Supp. 990 (1983), and 569 F. Supp. 1057 (1983).

the employee on actual productive work. Sound public policy and even corporate self-interest, however, surely permit the inclusion of time off work due to job-related injuries or unhealthful working conditions, or, indeed, any disease, disability, or other medical condition preventing the employee from performing his or her job in normal fashion. The telephone company's plan in the case at bar has always included medical leave but excluded personal leave in computing seniority.

The problem involved in the case at bar stems from the fact that up until legislation enacted by Congress in 1978<sup>5</sup> the company counted pregnancy leave for women employees as personal leave, not as medical leave.<sup>6</sup> Such action was then not unlawful. Upon enactment of the 1978 law the company began, and continues, to count pregnancy leave as medical leave.

The authoritative case law requires *current* unlawful discrimination in order to support a title VII violation. *Bazemore, supra*, upon which the majority relies, makes plain that "While recovery may not be permitted for pre-1972 acts of discrimination, to the extent that this discrimination was perpetuated after 1972, liability may

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<sup>5</sup> Act of October 31, 1978, 92 Stat. 2076, 42 U.S.C. 2000e-(k).

<sup>6</sup> As explained in appellant's brief (p. 5):

At the time [of appellant's pregnancy in 1972], Pacific Telephone's policies required disabled pregnant employees to take personal leaves instead of disability leaves. Persons temporarily disabled for reasons other than pregnancy were given disability leaves while they were unable to work.

be imposed." 478 U.S. at 395, 106 S.Ct. at 3006. In *Bazemore* actual disparity between black and white employees with respect to pay continued to exist. In Justice Brennan's trenchant phrase, "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." In *Bazemore* there was a *current discrimination* being practiced.

In the case at bar, by contrast, all that the telephone company is currently doing is applying a bona fide seniority system, which is not discriminatory on its face, and is specifically authorized by Congress.<sup>7</sup> Such current activity of the company, as previously stated, consists simply of examination of the company's records and adding up the time the employee has worked for the company, as disclosed by those records. Neither we nor the telephone company can erase or change history. We cannot, like the Communists' comical claims that they invented all useful inventions now in common use, alter or falsify the past. The company can say, with Pontius Pilate, "What I have written, I have written."<sup>8</sup> Or, as eloquently stated in the familiar passage of the Rubaiyat:

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<sup>7</sup> See note 2, *supra*.

<sup>8</sup> J.A.19:22. It is true that the company did adjust appellant's record to give her several more days (but not enough to qualify her for the early retirement she sought). I think this adjustment simply accepted her doctor's opinion of when she was able to return to work rather than the company doctor's. To contend that such an adjustment defeats the company's general reliance on its non-discriminatory seniority plan

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The Moving Finger writes; and, having writ,  
 Moves on: nor all your Piety nor Wit shall lure it  
 back to cancel half a Line, Nor all your Tears  
 wash out a Word of it.<sup>9</sup>

Appellant's grievance is one that belongs to history; it is not a current violation of law.<sup>10</sup> Currently there is no discrimination between pregnant and non-pregnant women, nor between pregnant women and men with a sex-specific ailment such as prostate condition (which was mentioned at argument), or men with other mutually

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reminds me of those courts which in my law school days treated a special appearance to object to the jurisdiction of the court as constituting an acceptance of its jurisdiction over the merits of the case.

<sup>9</sup> The Rubaiyat of Omar Khayyam (Fitzgerald, tr.) Stanza 71.

<sup>10</sup> The situation in the case at bar can be illustrated by a hypothetical case. Suppose that appellant were a graduate of Harvard Law School, and that three years after women were first admitted to Harvard Law School, she sought election to the imaginary office of Historian of the Alumni Association, to be eligible for which post the by-laws for over a quarter of a century and without any specific sexual animus have provided that only alumni of five years' standing or more are eligible. (Assume *arguendo* also that such a requirement is reasonable (like minimum age for service in the Congress), and also that it would now be unlawful to exclude women from the School but was not prior to the year when they were first admitted during the deanship of Erwin Griswold]. Is it not plain that simply as a matter of chronology she would be ineligible for lack of the five years' standing required for election to that office?

available medical reasons for absence from work. Hence I would affirm on the Title VII claim.<sup>11</sup>

I agree with the majority on the ERISA claim.

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<sup>11</sup> As Judge Schroeder states, "the parties agree that the same legal analysis" applies to appellant's claims under California legislation.

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## APPENDIX B

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

LANA PALLAS,	)	
Plaintiff-Appellant,	)	No. 90-15559
	)	
v.	)	D.C. # CV-89-2373-DLJ
PACIFIC BELL; PACIFIC	)	(Northern California)
TELESIS, ET AL.,	)	
Defendants-Appellees.	)	ORDER
	)	
	)	(Filed Sept. 26, 1991)
	)	

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Before: SCHROEDER and FARRIS, Circuit Judges, and  
DUMBAULD,\* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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\*Honorable Edward Dumbauld, Senior United States District Judge for the Western District of Pennsylvania, sitting by designation.

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Appellees' motion to stay the mandate is GRANTED.

**APPENDIX D**  
**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**

LANA PALLAS,	)	
	)	C89-2373-DLJ
Plaintiff,	)	
	)	
v.	)	ORDER DISMISSING
	)	COMPLAINT
PACIFIC BELL et al.,	)	
	)	
Defendants.	)	(Filed Febr. 28, 1990)
<hr style="width: 45%; margin-left: 0;"/>		)

The Court heard defendants' motions to dismiss under Rule 12 (b) (6) on December 13, 1989. Appearing for plaintiff were Shauna I. Marshall of Equal Rights Advocates and Robert Hirsch of Van Bourg, Weinberg, Roger & Rosenfeld. William Gaus of Pillsbury, Madison & Sutro appeared for defendants Pacific Bell and its related companies and pension plans. Jeffrey D. Wohl of Orrick, Herrington & Sutcliffe appeared for defendant American Telephone & Telegraph Company, Inc. ("AT&T").

After review of the briefs submitted by the parties, the oral argument of counsel, and the applicable legal standard, the Court hereby DISMISSES plaintiff's first and second claims for relief under the Civil Rights Act of 1964 and the California Fair Employment and Housing Act. Plaintiff's third claim for relief, under ERISA, 29 U.S.C. § 1104, is DISMISSED WITH LEAVE TO AMEND.

**I. FACTS**

Plaintiff seeks declaratory and injunctive relief and damages for defendants' failure to qualify her for an

Early Retirement Option ("ERO") benefit which was made available in 1987 to employees with 20 years or more Net Credited Service ("NCS"). Although plaintiff commenced employment with the predecessor of defendant Pacific Bell on or about December 20, 1967, she failed to qualify for the ERO because of a break in service in 1972 during which she was on leave due to pregnancy. At the time, her employer treated leaves for pregnancy as "personal leave" – which would not count as service toward retirement – rather than as "temporary disability leave" – which would count for seniority benefits such as retirement. Plaintiff received full credit for the periods both before and after her leave, but the actual time of leave taken was not included for calculating her service. Upon this basis, plaintiff was determined by her employer to lack three to four days of net service credit to qualify for the plan, and she was denied the ERO benefit.

The Complaint alleges that failure to reclassify plaintiff's 1972 pregnancy leave as disability leave for purposes of determining eligibility for the 1987 ERO benefit violates the Pregnancy Discrimination Act, 42 U.S.C. § 2000e (k) ("PDA"), or alternatively constitutes sex discrimination in violation of the Civil Rights Act of 1964 in that only women were denied the ERO benefit due to breaks in service for pregnancy leave which reduced their Net Credited Service. The Complaint alleges violations of the California Fair Employment and Housing Act, Cal. Gov't Code §§ 12940, 12945, in this same conduct. Finally, the Complaint alleges that the denial of the ERO benefit to plaintiff was determined in a manner violative of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq.

Defendants concede all the facts stated in the Complaint, and move for dismissal under Rule 12(b) (6) of the Federal Rules of Civil Procedure on the grounds that these facts do not state a cause of action, either for sex or pregnancy discrimination or for violations of ERISA. In addition, defendant AT&T requests the Court to take judicial notice of a 1983 district court divestiture decree requiring that divested regional companies, including the other defendants in this action, take over complete responsibility for their pension plans. *United States v. Western Elec. Co., Inc.*, 569 F.Supp. 1057, 1093 (D.D.C. 1983). Based upon this decree, AT&T argues it is not a party to the 1987 conduct complained of and seeks dismissal as a defendant even were the Court to deny the Rule 12(b) (6) motion to dismiss.

## II. DISCUSSION

### A. Standard for Dismissal

The question presented by a motion to dismiss is not whether plaintiff will prevail in the action, but whether plaintiff is entitled to offer evidence in support of her claim. "[T]he accepted rule [is] that a complaint should not be dismissed for failure to state a claim unless 'it appears beyond doubt the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Conley v. Gibson*, 78 S.Ct. 99, 102 (1957). In the Ninth Circuit, the Court making this determination must assume that plaintiff's allegations are true, construe the complaint in a light most favorable to plaintiff, and resolve every doubt in plaintiff's favor. *United States v. City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981).

Therefore, the Court will dismiss the complaint or any claim in it without leave to amend only if "it is 'absolutely clear that the deficiencies of the complaint could not be cured by amendment.'" *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987) (quoting *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980) (per curiam).

### B. Claim for Relief Under Title VII

Prior to passage of the PDA, employer disability benefit plans which failed to cover pregnancy-related disabilities were not unlawful. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401 (1976). Congress overruled *Gilbert* in 1979, when the PDA amended the Civil Rights Act of 1964 to provide that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other person not so affected . . . ." 42 U.S.C. § 2000e(k). Plaintiff's counsel conceded at oral argument that plaintiff has not preserved any claim for discrimination from 1972 resulting from the failure to classify her leave as disability leave, even assuming that passage of the PDA would reinstate such a claim in 1979. Therefore, plaintiff's cause of action arises solely from post-1979 applications of her NCS without adjustment to credit the period of her 1972 pregnancy leave.

Plaintiff argues in the first instance that applying the NCS system without adjustment is facially discriminatory toward women because only women were denied service credits for periods of pregnancy leave. This, plaintiff claims, is the same as permitting NCS to accumulate for

women at a slower rate than it does for men. The Court is not persuaded by this argument.

A policy is facially neutral if it does not treat similarly situated employees differently based on the suspect criteria (here, pregnancy); this rule applies even though some basis for the neutral policy rests on a policy that now would be held discriminatory. *E.g., United Air Lines, Inc., v. Evans*, 97 S.Ct. 1885, 1889 (1977) (maintenance of a seniority system in which a woman was denied preference over subsequently-hired males was nondiscriminatory if she was also denied preference over subsequently-hired females). Under this rule, calculating plaintiff's service credit without adjustment for her pregnancy leave is facially neutral in that a woman who started work at the same time as plaintiff but took pregnancy leave after the policy was changed in 1979 would be eligible for the ERO while plaintiff would not.

Thus, the crucial factor contributing to a reduced NCS for plaintiff is not that she is a woman, or even that she took pregnancy leave, but that she took pregnancy leave at a certain time. This is not a case where, as described in *Lorance v. AT&T Technologies, Inc.*, 109 S.Ct. 2261, 2269 n.5 (1989), a woman is assigned half the seniority that a man receives for the same time worked. Here, for each credited day worked plaintiff received the same amount of seniority as other employees, male or female, and, after 1979, on pregnancy leave or not.

In view of this, the NCS system is facially neutral, and the parties agree that *Evans* provides the controlling law for a facially neutral system. In *Evans*, as here, the plaintiff asserted that her injury lay in the employer's

reliance upon an earlier act, lawful at the time but now discriminatory, to deny her seniority. The Court agreed that the earlier, discriminatory, system had a continuing impact on the plaintiff's pay and fringe benefits, but that this impact did not amount to a continuing violation of Title VII. *Id.* at 1889. The holding in *Evans* is precisely on point: the continuing impact of the earlier denial of service credit to plaintiff for the period of her pregnancy leave does not amount to a continuing violation of Title VII at the time that her NCS for retirement is actually calculated.

Plaintiff asks the Court to find the *Evans* rule as applied to this case modified by *Bazemore v. Friday*, 478 U.S. 385, 106 S.Ct. 3000 (1986). In *Bazemore* the Supreme Court held that an employer who paid disparate salaries to black and white employees prior to the passage of Title VII had a duty to eradicate salary disparities following passage of the Act. *Id.* at 386-87. The Court declines to read this rule in its broadest sense, as imposing an affirmative duty to eliminate all continuing impacts of prior discriminatory policies, no matter how incidental to the present benefit. *Bazemore* is clearly distinguishable from the present case in identifying the actionable wrong as "[e]ach week's paycheck that delivers less to a black than to a similarly situated white," *id.* at 395 (Brennan, J., concurring), i.e., each paycheck that was less than 100% of a white employee's salary. This is similar to the 50% seniority allocation identified as facially discriminatory in *Lorance*.

Plaintiff by contrast received 100% of her credited service for each day worked *before and after her pregnancy leave*. To adopt plaintiff's reasoning would require the

Court to consider that every day plaintiff accumulated service credits following her leave was a separate actionable wrong, because the total accumulated was less than it would have been had she received credit for her leave time. Such impact not only is lesser to begin with than a continuing salary disparity, it diminishes over time as leave accumulates at the full rate.

Therefore, application of plaintiff's NCS based in part upon the denial of service credit for her pregnancy leave does not state a cause of action under Title VII, and plaintiff's First Claim for Relief is DISMISSED.

### C. California Fair Employment and Housing Act

California's Fair Employment and Housing Act, Gov't Code § 12900 *et seq.*, contains a provision parallel to that in the PDA, making it an unlawful business practice to "refuse to allow a female employee affected by pregnancy, childbirth or related medical conditions . . . [t]o receive the same benefits or privileges of employment granted by that employer to other persons not so affected . . . including to take disability or sick leave . . ." Cal. Gov't Code § 12945(b) (1). This provision is clearly modeled on the PDA, as it was adopted in 1980.

Therefore, the *Evans* analysis for continuing violations of Title VII applies to the FEHA claim as well, and the Court finds no continuing violation of FEHA in refusing to grant plaintiff credit for pregnancy leave taken before passage of the Act.

Further, any state law claim for discrimination beyond the scope of Title VII would be preempted by

ERISA under the rule in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890 (1983). There the Supreme Court specifically found that state antidiscrimination statutes mandating disability benefits for pregnancy beyond the scope of prohibited practices under Title VII are preempted by ERISA, while state statutes which parallel Title VII are not. This is so because state anti-discrimination provisions within the scope of Title VII were subject to the savings clause of ERISA § 514(a), 29 U.S.C. § 1144(a). *Id.* However, where state law prohibits practices which Title VII holds lawful, such law is not subject to the savings clause, and is preempted by ERISA. *Id.* at 2903.

For these reasons, plaintiff's Second Claim for Relief, under the California Fair Employment and Housing Act, is DISMISSED.

#### D. Improper Administration of Claim – ERISA

Plaintiff has identified a colorable claim for improper administration of her application for the ERO benefit in violation of ERISA. Defendants argue persuasively that the policy of calculating NCS without making an adjustment for pre-1979 pregnancy leave does not state a claim under ERISA.

However, plaintiff has identified two alternative methods of determining eligibility for the ERO benefit, as described in the ERO amendment to the Plan. *See Addendum to Pacific Telesis Group Pension Plan for Salaried Employees for 1987 Window Period Retirements ("ERO Plan")*. Specifically, the benefit was apparently available to employees whose service as adjusted amounted to 20

years, or to employees whose "unadjusted term of employment" on December 31, 1987, would amount to 20 years. Because plaintiff commenced her employment with defendants on December 20, 1967, it appears from the face of the ERO Plan that she might have been eligible for the ERO benefit under this second criteria. In addition, the term "Net Credited Service," on which defendants rely to justify their denial of the ERO benefit to plaintiff, is not defined in the ERO Plan.

Therefore, an ambiguity exists on the face of the ERO Plan, and plaintiff may be able to state a claim for improper administration of her application for benefits. However, the Complaint in its present form fails to allege facts sufficient to state a claim based on administrative conduct. Although defendants assert that the plan provides the administrator with complete discretion and that they could, therefore, survive a challenge based on the "arbitrary and capricious" standard, it is appropriate at this time to permit plaintiff to state such a claim, if she can.

The Court notes that, in order to retain AT&T as a defendant, the amended complaint must articulate a ground for AT&T's continuing administrative capacity in regard to the ERO Plan following the 1983 divestiture of Pacific Bell and other subsidiaries. *See United States v. Western Elec. Co., Inc.*, 569 F.Supp. 1057, 1093 (D.D.C. 1983).

Therefore, plaintiff's Third Claim for Relief is DISMISSED WITH LEAVE TO AMEND to state facts sufficient to allege administrative conduct in violation of ERISA.

### III. CONCLUSION

For the reasons stated above, the Court rules as follows:

1. Plaintiff's first claim for relief for discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, is DISMISSED WITH PREJUDICE.

2. Plaintiff's second claim for relief for discrimination under the California Fair Employment and Housing Act, Calif. Gov't Code § 12900 *et seq.* is DISMISSED WITH PREJUDICE.

3. Plaintiff's third claim for relief under ERISA § 404, 29 U.S.C. § 1104, is DISMISSED WITH LEAVE TO AMEND to allege facts supporting a claim for improper administration of her application for benefits and to articulate the ground, if any, upon which defendant AT&T retained administrative authority at the time plaintiff's claim was decided.

Plaintiff has 30 days from the filing date of this Order to file her amended complaint. A status conference is set in this matter for May 2, 1990, at 9:00 a.m.

IT IS SO ORDERED.

DATED: February 28, 1990.

/s/ D. Lowell Jensen  
D. Lowell Jensen  
United States District Judge

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## APPENDIX E

29 USC § 1104 provides in pertinent part:

(a) (1) Subject to sections 1103(c) and (d), 1342 and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and -

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.<sup>1</sup>

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<sup>1</sup> Subsequent to events and actions at issue in this case, 29 U.S.C. § 1104 (a) (1) (D) was amended. The amendment was effective September 30, 1990. That section now reads:

"in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter *and* subchapter III of this chapter."  
(Underscore reflects amendment.)

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